IN THE SUPREME COURT OF THE UNITED STATES

DEC 9 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-187

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Petitioners,

vs.

G.W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; The State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Respondents.

On Petition for Writ of
Certiorari to the
Supreme Court of the State of
North Dakota

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of petition for writ of certiorari, on November 18, 1974, and (2) granting the petition. An Order granting petitioners' application to suspend the effect of the order of this Court denying petition for writ of certiorari was signed on November 21, 1974, by Associate Justice, Honorable Harry A. Blackmun, No. A-424 (74-187) for which petitioners are sincerely thankful. As grounds for this motion, petitioners state the following:

There is pending before this Court for argument on appeal from a three judge court from the United States District Court, Eastern District of Wisconsin, the case of WITHROW v. LARKIN, No. 73-1573, during the October, 1974 Term of this Court, wherein the issues to be decided will have a substantial or controlling effect upon petitioners' case. (Copy of opinion below, the Wisconsin case printed in appendix.)

The instant case involves the constitutionality of statutes relating to administrative agencies and due process of law. The Wisconsin case to be heard and determined by this Court involves the same issues.

The Constitution of the United States, though guaranteeing "due process of law" for our people, is of no value nor effect in and of itself, for alone it can do nothing.

The judiciary is the backup and bulwark of those guarantees; but, when a state judiciary disregards the Constitution of the United States, which by its own state's Constitution (Section 3, Constitution of North Dakota) states " . . . is the supreme law of the land", (Printed on page 3, Petition for writ) then we pray the attention of this Court to review and supervise the ac-

tions of such court to uphold those constitutional guarantees.

The statutory "scheme" for the appointment of the State Banking Board and its control over the financial institutions of the State of North Dakota, contrary to the opinion of the Supreme Court of North Dakota, which states that such "scheme" is constitutional, actually holds the state banking industry in North Dakota in a position of bondage through intimidation and coercion.

The irony of this situation is that the statutes on their face are unconstitutional, in that the State Examiner, as the Commissioner of Banking and Financial Institutions (6-01-01 N.D.C.C. printed on page 4 of Petition for Writ) is also the Chairman of the State Banking Board, (6-01-03 N.D.C.C. printed on page 4 and 5 of Petition for Writ).

The State Examiner, not as an administrative officer, makes examinations, investigations, recommendations, and suggestions to the State Banking Board, an administrative agency, of which he is chairman (6-01-09 N.D.C.C. printed on pages 6 and 7 of Petition for Writ). See Judge Kelsch's opinion page A22 in Petition for Writ.

The State Banking Board then proceeds to charge, prosecute, try or judge and adjudicate its own allegations against the accused, which allegations or charges, particularly in this case, had been previously adjudged against said accused.

Unless this august Court takes command of the abuses taking place by the administrative agencies in their failure to afford "due process" to those, under their jurisdiction, accused of violating statutes and

administrative rules and regulations, and in this instance where there are no such rules and regulations, and the violations are charged and found to have been committed on an arbitrary basis, our system of jurisprudence will soon fail; our judiciary will become secondary to such agency proceedings, which are already binding the hands of the judiciary by their purported fact finding procedures.

Whereas, we sing praises in classic songs about America, in which we state "*. . . Thy liberty in law.*" we may soon be unable to sing such praises because man will have destroyed that law and made us subjects of tyranny.

Although it may appear in this case, at first blush, that there is only a local concern, this is not true, for the principle of law involved is the "due process" guarantee of the Constitution of the United States, which this Court should review, in this case, to fortify such principle in its application to all administrative proceedings throughout the United States, and the statutes of those states as they pertain to such agencies.

The statutes and facts in the Wisconsin case, to be argued on appeal before this Court, are not identical to those in petitioners' case; nevertheless, the principle of law is the same, and, whereas, not only was "due process" not exercised in the instant case, the statutory "scheme" under which the administrative agency is formed makes it impossible to follow the "due process" requirement of the Constitution of the United States.

To allow the statutory "scheme" of North Dakota, under any pretext, for the appointment of the State Banking Board, as an administrative agency, to

stand, would be a mockery and insult to the intelligence of the practicing bar and despair to the public.

This Court is the last shield against the creeping paralysis of bureaucracy, and, though it may become burdensome, nevertheless, each time such occasion raises its ugly head, this Court must rise to the challenge and defend and refortify those constitutional guarantees which are the rock foundation of this Republic.

It is not enough that prior decisions of this Court, including:

> In re Murchison, 349 US 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) "*A fair trial in a fair tribunal is a basic requirement of due process.*" 349 US at 136.

> Kinsella v. United States, 361 US 234, 80 S.Ct. 297, 4 L.Ed. 2d. 268 (1960) "*Due process . . . has to do . . . with the denial of 'Fundamental fairness, shocking to the universal sense of justice'.*" 361 US at 246.

> Goldberg v. Kelly, 397 US 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), "*An impartial decision maker is essential*", 397 US at 271.

> Morrissey v. Brewer 408 US 471, 92 S.Ct. 2593, 33 L.Ed2d. 484 (1972), "*Our task is limited to deciding minimum requirements of due process. They include . . . (e) a 'neutral and detached' hearing body . .* ". 408 US at 488, 489.

> Gibson v. Berryhill, 411 US 564, 93 S.Ct. 1689, 36 L.Ed.2d. 488, (1973), *"Most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators"*. 411 US at 579.
>
> Gagnon v. Scarpelli, 411 US 778, 93 S.Ct. 1756, 36 L.Ed.2d. 656, (1973), *"an independent decision maker"*. 411 US at 786. (Emphasis added.)

established and echoed the *minimum requirements* of "due process", because there are those, in lower positions, who continue to disregard and thwart those decisions to justify the ends of their particular circumstances.

What judicious words of providence can these petitioners possibly impart to this Court, to invoke its discretion and judicial wisdom to recognize the perils of allowing the opinion of the Supreme Court of North Dakota to stand unreviewed and unreversed to the detriment of the public interest and justice in these United States?

Petitioners must prevail, not only to win as it were, but to reaffirm to the people of North Dakota, and to the public generally, that the Supreme Court of the United States and the Constitution of the United States stand undaunted and impregnable against infringement from statutes involving administrative agencies, and the administrative agencies themselves, from being allowed to continue EXTRAJUDICIAL REPRISALS against those within their jurisdiction, *in the form of a purge*, in violation of the Constitution of the United States!

CONCLUSION

In the interest of justice, we respectfully submit that this Court should grant this petition for rehearing, vacate its order of November 18, 1974, denying Petition for Writ of Certiorari and grant that petition.

Date: December 6, 1974.

Respectfully, submitted,
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CERTIFICATE OF COUNSEL

As Counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith, and not for delay, and is restricted to the grounds specified in Rule 58 (2).

/s/ Frederick E. Saefke, Jr.
FREDERICK E. SAEFKE, Jr.
Attorney for Petitioner

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Duane Larkin, M.D.,

Plaintiff.

vs. No. 73-C-360

Harold Withrow, D.O., et al.

Defendants.

DECISION

On November 19, 1973, this three-judge court sustained the plaintiff's procedural due process challenge to the constitutionality of Section 448.18(7) Wis. Stats. (1971). We enjoined the state medical examining board from enforcing that statute, which authorized it to suspend a physician's license for up to two consecutive three-month periods "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has engaged in certain proscribed conduct. Vague as it is, "(E)ngaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public" qualifies as one such offense. See Section 448.18(1)(a) Wis. Stats. (1971).

Permanent revocation of a physician's license can be accomplished only through a court action prosecuted by the district attorney. The state medical examining board investigated the plaintiff, Dr. Duane Larkin, and presented charges to the district attorney. See Section 447 Wis. Stats. (1971). Neither the

propriety of the board's investigation of Dr. Larkin nor the merits of its charges against him was involved here. What we determined was that for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as Section 448.18(7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision-maker, we concluded that it was unconstitutional and unenforceable.

Procedural due process is required in those instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment." Doe v. Bolton, 410 U.S. 179, 188 (1973).

The suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, _____ F.2d _____ (7th Cir., case number 72-1656, decided September 14, 1973). See also Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

In several cases involving hearings required by due process, the United States Supreme Court has delved into the area of minimal due process requirements. In Gagnon v. Scarpelli, 411 U.S. 778

(1973), the Court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker". 411 U.S. at 786. The state medical examining board does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney.

It is true that any action taken by the board pursuant to Section 448.18 (7) is subject to judicial review under Section 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional.

For these reasons, on November 19, 1973, we ordered that the plaintiff's motion for a preliminary injunction be granted. The defendants were enjoined from enforcing the provisions of Section 448.18 (7) Wis. Stats. (1971), it having been determined by us that such statute is unconstitutional.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1973.

/s/ F. Ryan Duffy,
Sr. Circuit Judge

/s/ John W. Reynolds
U.S. District Judge

/s/ Myron L. Cordon
U.S. District Judge